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No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF HABEAS CORPUS SCHOLARS JOHN BLUME, ERWIN CHEMERINSKY, ERIC FREEDMAN, RANDY HERTZ, JAMES LIEBMAN, IRA ROBBINS, AND LARRY YACKLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, who file this brief with the consent of the parties, are law school professors John H. Blume, Associate Professor of Law and Director of the Cornell Death Penalty Project, Cornell Law School; Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science, Duke University School of Law; Eric M. Freedman, Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra Law School; Randy Hertz, Professor of Clinical Law and Director of the Clinical and Advocacy Programs, New York University School of Law; James S. Liebman, Simon H. Rifkin Professor of Law, Columbia University; Ira P. Robbins, Barnard T. Welsh Scholar and Professor of Law and Justice, American University Washington College of Law; and Larry Yackle, Basil Yanakakis Faculty Research Scholar, Boston University School of Law. *Amici* teach courses, conduct research, and publish articles and books on various topics related to federal habeas corpus, practice and procedure, and criminal justice.[2] *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

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[1] Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. Rev. 271 (1996); Erwin Chemerinsky, *Federal Jurisdiction* (Aspen Law & Business 4th ed. 2003); Eric M. Freedman, *Habeas Corpus: Re-Thinking the Great Writ of Liberty* (N.Y.U. Press 2001); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (Vols. 1 and 2) (all eds. (1st-4th) and all supps. (1989-2002)); Ira P. Robbins, *Habeas Corpus Checklists* (annual eds., 1993-2006); Larry Yackle, *Habeas Corpus* (2003).

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner Patrick Day. On November 29, 2004, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's ruling that Mr. Day's petition for a writ of habeas corpus was untimely under 28 U.S.C. § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996) ("AEDPA"). Although the State's answer to the habeas petition expressly conceded that the petition was timely filed, the district court nonetheless *sua sponte* raised the statute of limitations issue and dismissed the petition. In affirming, the Eleventh Circuit held that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA." *Day v. Crosby*, 391 F.3d 1192, 1195 (11th Cir. 2004). The Eleventh Circuit further held that the failure to plead an affirmative defense in a habeas case does not constitute a waiver as it does in other civil cases. *Id.* at 1194. Mr. Day filed a petition for a writ of certiorari to this Court, which was granted on September 27, 2005.

Amici submit that the Court should reverse the Eleventh Circuit's ruling on the grounds that the State waived the statute of limitations defense and the lower court should not have raised the issue *sua sponte*. Under the Federal Rules of Civil Procedure, which should govern here, the statute of limitations is an affirmative defense that is waived by the defending party if not asserted in a timely manner. Thus, in civil cases, it is improper in most instances for a court to raise the affirmative defense of statute of limitations *sua sponte*. Rules of statutory construction support application of these principles to AEDPA. If Congress had intended to protect against waiver of the limitations defense under AEDPA, it could have explicitly so stated – as it did with respect to exhaustion of remedies. Moreover, important

historical principles and policy considerations weigh heavily against a court's *sua sponte* dismissal of a petition after the court has ordered filing of a responsive pleading. Because the statute of limitations is a departure from common law in the habeas context, the limitations provision should be read narrowly. Moreover, just as in ordinary civil cases, a rule providing for waiver and prohibiting *sua sponte* invocation of the limitations defense in the habeas context promotes the tenets of the adversarial system and the interests of finality and certainty. Finally, Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") does not authorize a departure from the manner in which a court treats the statute of limitations defense under the Federal Rules of Civil Procedure. Thus, after the court has required the State to answer the petition, the court no longer has the authority to dismiss *sua sponte*.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, A PARTY WAIVES A STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD IT AND A COURT ERRS BY RAISING THE DEFENSE *SUA SPONTE*

Under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, a party responding to a claim must assert all affirmative defenses in its responsive pleading. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 5.20 (1985) (defendant must plead affirmative defense in answer so that plaintiff is aware of allegations and has an opportunity to prepare to meet them). Like all the defenses enumerated in Fed. R. Civ. P. 8(c), the statute of limitations defense is a non-jurisdictional affirmative defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *O'Neel v. Nat'l Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982)

("We specifically renounce the contention that the defense of the statute of limitations goes to jurisdiction of the tribunal . . . ."). Generally, an affirmative defense that is not raised in the responsive pleading is waived. *See, e.g., Kropelnicki v. Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not raised."); *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) ("The statute of limitations is an affirmative defense which must be specifically pled . . . . [F]ailure to plead the bar of the statute of limitations constitutes a waiver of the defense."); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 644 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case . . . .").[3]

These principles are a critical component of the adversarial system, which requires the parties to a dispute, not the courts, to frame the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").[4] These principles are particularly applicable to statutes of limitations, which protect the defending party against stale claims and

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[3] *See also Haskell v. Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988) (failure to raise limitations defense in first responsive pleading constitutes waiver).

[4] *See also Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1130 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) ("Under ordinary principles of the adversary system, we do not reach out to decide questions not before us."), *cert. denied*, 541 U.S. 1043 (2004).

promote finality of cases in certain circumstances. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations provide protection from stale claims).[5] Thus, the burden is properly placed on the defending party to assert a statute of limitations defense. *Id.* (statutes of limitations "put the adversary on notice to defend within a specified period of time").

Given these principles, a court should not correct a party's failure to plead an affirmative defense, such as the statute of limitations, by raising it *sua sponte*, because to do so would render waiver meaningless. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997) (raising affirmative defense *sua sponte* puts court in "untenable position of ferreting out possible defenses upon which the state has never sought to rely" and makes judges come "dangerously close to acting as advocates for the state rather than as impartial magistrates"), *cert. denied*, 522 U.S. 1109 (1998); *Haskell v. Washington Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [the statute of limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning." (citations omitted)).[6] *Amici* urge this Court to hold that these well-settled principles applicable to civil cases apply equally to cases arising under AEDPA.

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[5] *See also McGraw v. Matthaei*, 388 F. Supp. 84, 88-89 (E.D. Mich. 1972) (untimely raising of statute of limitations not allowed when extensive trial preparation and discovery had already taken place).

[6] *See also Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003) ("Courts generally lack the ability to raise an affirmative defense sua sponte."); *Kropelnicki*, 290 F.3d at 130 n.7 ("[W]e have held that 'a district court "ordinarily" should not raise a statute of limitations defense *sua sponte*.'" (citation omitted)); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("Generally, where the parties have not raised a defense, the court should not address the defense sua sponte.").

II. THE PRINCIPLES GOVERNING THE LIMITATIONS DEFENSE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO HABEAS CORPUS CASES

Rule 81(a)(2) of the Federal Rules of Civil Procedure states:

> These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Similarly, Rule 11 of the Habeas Rules provides: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." This Court has confirmed that habeas cases are civil proceedings generally governed by the Federal Rules of Civil Procedure. Indeed, in *Banks v. Dretke*, 540 U.S. 668, 704-05 (2004), the Court held that Fed. R. Civ. P. 15(b), governing amendments to pleadings, applies in habeas cases. *See also Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 269 (1978) (habeas is civil proceeding governed by Federal Rules of Civil Procedure). Lower courts have adopted this principle. *See, e.g., Farmer v. Litscher*, 303 F.3d 840, 842-43 (7th Cir. 2002) (common understanding that habeas corpus cases are civil rather than criminal proceedings); *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516, 523 (3d Cir. 1973) ("[F]ederal habeas corpus proceedings are *civil*, and not criminal, in nature. They are governed by the Federal Rules of Civil Procedure." (footnote omitted)). For the reasons set forth below, these principles apply to consideration of affirmative defenses, such as the statute of limitations, in

habeas cases and thus require timely assertion of such defenses to avoid waiver.[7]

A. AEDPA Does Not Preempt Application Of Federal Rule Of Civil Procedure 8(c) And Its Principles To Habeas Corpus Cases

Nothing in AEDPA suggests that Congress intended to depart from the basic federal rule that a statute of limitations defense is waived if it is not asserted timely and a court lacks authority to thereafter raise it *sua sponte*. The lower courts are in agreement that AEDPA's statutory limitations period is an affirmative defense. *See Nardi v. Stewart*, 354 F.3d 1134, 1140 (9th Cir. 2004) ("There is no dispute that AEDPA's statute of limitations is an affirmative defense."); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (same).[8] Neither AEDPA nor its legislative history addresses assertion and waiver of the defense, nor are

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[7] This Court's recent decision in *Mayle v. Felix*, 125 S. Ct. 2562 (2005), reiterates the policy of applying the Federal Rules of Civil Procedure to habeas corpus cases. In *Mayle*, this Court rejected the petitioner's argument that Fed. R. Civ. P. 15(c)(2) should be interpreted more broadly in the habeas context than in ordinary civil proceedings, citing concerns that such an interpretation would undermine the purpose of AEDPA's statute of limitations. In so holding, this Court stated that its reading of Fed. R. Civ. P. 15(c)(2) in the habeas context "is consistent with the general application of Rule 15(c)(2) in civil cases, with Habeas Corpus Rule 2(c), and with AEDPA's installation of a tight time line for § 2254 petitions." *Id.* at 2574-75 (citations omitted). The policy that *Amici* advocate in the instant case, requiring the State to follow Fed. R. Civ. P. 8(c) and assert the statute of limitations defense in its responsive pleading, comports with this Court's holding in *Mayle*.

[8] *See also Scott v. Collins*, 286 F.3d 923, 927 (6th Cir. 2002) (same); *Carrington v. Robinson*, No. 99-CV-76377-DT, 2001 WL 558232, at *4 (E.D. Mich. Mar. 27, 2001) (same); *Acosta v. Artuz*, 221 F.3d 117, 121-22 (2d Cir. 2000) (same); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (same).

there any provisions suggesting application of a different standard from that applied under Fed. R. Civ. P. 8(c). Thus, in a habeas case, just as in an ordinary civil case, a responding party must assert a statute of limitations defense in its responsive pleading, and failure to do so results in a waiver. *See Nardi*, 354 F.3d at 1141 (State must raise statute of limitations defense in order to avoid waiver); *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (affirmative defenses under AEDPA should be treated the same as in other civil cases), *cert. denied*, 540 U.S. 826 (2003); *Scott v. Collins*, 286 F.3d 923, 927-30 (6th Cir. 2002) (failure to plead statute of limitations defense in habeas case results in waiver).[9] As explained in *Pino v. United States*, No. 98 Civ. 0092(RCC), 2004 WL 1320888 (S.D.N.Y. June 14, 2004), "'[p]arties are generally required to assert affirmative defenses early in litigation, so they may be relied upon, prejudice may be avoided, and judicial resources may be conserved. Habeas proceedings are no exception.'" *Id.* at *2 (quoting *Robinson*, 313 F.3d at 134); *see, e.g., Green v. United States*, 260 F.3d 78, 85 (2d Cir. 2001) ("the government expressly waive[d] its [AEDPA] statute of limitations defense by advocating a remand and 'suggesting' the conditions for that remand").

In *Robinson*, the Third Circuit explained why AEDPA's statute of limitations is waivable: "[B]ecause the AEDPA limitations period is subject to equitable modifications such as tolling, it is also subject to other

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[9] *See also Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (allowing for possibility of government waiver in finding that government did not waive its AEDPA statute of limitations defense); *Saucier v. Warden, N.H. State Prison*, 215 F.3d 1312 (table), No. 99-1345, 2000 WL 739713, at **1 (1st Cir. June 5, 2000) (unpublished) (same); *Samuel v. Duncan*, 92 F.3d 1194 (table), No. 95-56380, 1996 WL 413632, at **1 (9th Cir. July 22, 1996) (unpublished) (AEDPA statute of limitations defense can be waived); *Andrews v. Johnson*, 976 F. Supp. 527, 530 (N.D. Tex. 1997) (statute of limitations in habeas context is affirmative defense that is waived if not pleaded).

non-jurisdictional, equitable considerations, such as waiver." 313 F.3d at 134. The court went on to explain that "affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter." *Id.* at 137. In so holding, the court reviewed several cases and concluded that the purpose of requiring parties to raise affirmative defenses early on was "not only to avoid prejudice, but also to promote judicial economy." *Id.*; *see also Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (citations omitted)). AEDPA's statute of limitations, like any other affirmative defense, must therefore be pleaded in the answer or at the earliest practicable moment thereafter. Otherwise, it is waived.

Furthermore, nothing in AEDPA overrides the corollary principle applied in civil cases that courts should not revive waived statute of limitations defenses by raising them *sua sponte*. Indeed, this Court has already made clear that *sua sponte* rulings in habeas cases are generally disfavored, both in cases in which the *sua sponte* ruling favored the State and in those in which the ruling favored the petitioner. In *Castro v. United States*, 540 U.S. 375, 383 (2003), for instance, the Court held that a lower court may not recharacterize a petitioner's motion as a motion for habeas relief without first notifying the petitioner of its intent to do so and giving the petitioner an opportunity to amend or withdraw the motion. Similarly, in *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court reversed and remanded the Ninth

Circuit's *sua sponte* recall of its mandate denying habeas relief. Citing the State's interest in finality, the Court held that a court of appeals may not *sua sponte* recall a mandate unless it is to correct a "miscarriage of justice," a standard that was not met in *Calderon*. *Id.* at 558; *see also Pliler v. Ford*, 542 U.S. 225, 231 (2004) (court is not required to *sua sponte* warn petitioners of consequences of voluntarily dismissing their petitions, as "[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants").

This general principle applies equally to *sua sponte* dismissals on limitations grounds. In this case, the court's *sua sponte* dismissal on limitations grounds was particularly inappropriate given that the State not only failed to assert a statute of limitations defense, but affirmatively conceded the timeliness of the habeas petition. *See Scott v. Johnson*, 227 F.3d 260, 262-63 (5th Cir. 2000) (State's intentional waiver of procedural defense serves as a consideration against *sua sponte* invocation of procedural bar).

While this Court has not adopted a firm rule barring *sua sponte* dismissals based on failure to exhaust other remedies or procedural default, those defenses raise comity and federalism concerns not applicable to limitations defenses. For example, in *Granberry v. Greer*, 481 U.S. 129 (1987), the State raised the affirmative defense of exhaustion of remedies for the first time on appeal, and this Court held that in the "exceptional case" where the State fails to raise a nonexhaustion defense, the lower court should evaluate whether the interests of comity and federalism are better served by an immediate review of the merits or by first requiring state and district court proceedings before reviewing the merits. *Id.* at 134. The *Granberry* Court focused on the history of the exhaustion doctrine, which recognizes that state courts generally should have the first opportunity to consider a claim. *Id.* at 133-34 (the exhaustion doctrine is based on

the principle of comity, "'"a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"'" (citations omitted)). Moreover, the Court rejected the appellate court's holding that the nonexhaustion defense could never be waived by the State, and instead favored a case-by-case determination of whether reaching the merits or requiring further state proceedings best served the interests of justice. *Id.* at 136.

Similarly, in *Trest v. Cain*, 522 U.S. 87, 89-90 (1997), this Court refused to reach the issue of whether a federal court of appeals could ever raise the procedural default defense *sua sponte*, but held that a court was not required to do so. The Court recognized that "'[i]n the habeas context, the application of the independent and adequate state ground doctrine,' of which a procedural default is typically an instance, 'is grounded in concerns of comity and federalism.'" *Id.* at 89 (quoting *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). As with the nonexhaustion defense in *Granberry*, *Trest* declined to hold that a procedural default defense could not be waived. *See id.* ("Thus, procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996))).

Unlike the principles underlying failure to exhaust and procedural default defenses – that is, respect for the state courts and a desire not to prematurely decide what should first be a matter of state law – the statute of limitations defense does not implicate these concerns. Instead, timeliness is a straightforward defense that the State may choose to either invoke or waive. As discussed below, the principles governing the adversarial system and the compelling interest in finality support a finding that courts should not *sua sponte* dismiss a habeas

petition as untimely where the State has waived the statute of limitations defense.

B. The Statutory Construction Tenets Support Application Of Federal Rules Of Civil Procedure Principles To AEDPA's Statute Of Limitations

The language and legislative history of AEDPA lend further support to the conclusion that *sua sponte* dismissals on statute of limitations grounds are improper. If Congress intended to protect the State from waiving the statute of limitations defense in habeas cases, it would have expressly said so. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), this Court reiterated the holding of *Mitsubishi* in interpreting Congress' intent with respect to the Age Discrimination in Employment Act of 1967 ("ADEA"). Here, because neither the plain language of AEDPA nor its legislative history suggests an intent to protect against waiver of the statute of limitations defense, Congress is presumed not to have intended to provide such protection. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. . . . The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules."); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way.").

That Congress did not intend to make an exception to the normal rules regarding waiver of the

statute of limitations defense is buttressed by the fact that in another section of the statute, Congress expressly protected the State against inadvertent waiver of the affirmative defense of exhaustion of state remedies. Section 2254(b)(3) provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added). Thus, Congress clearly knew how to alter the general rules of waiver to protect the State, and even did so expressly with respect to another procedural defense in habeas cases. Under basic rules of statutory construction, Congress' explicit protection of the State from inadvertent waiver of the exhaustion requirement and its failure to similarly protect the State from waiver of the statute of limitations defense indicates that Congress did not intend to provide such protection. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *accord Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same); Norman J. Singer, *Statutes and Statutory Construction* § 47.25, at 327 (6th ed. rev. 2000) ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." (footnotes omitted)).

There are many examples where this Court and lower courts have applied this negative inference in refusing to read into a statute language that is not stated expressly. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court, in construing AEDPA, interpreted "§ 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments

to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* at 327. The Court explained: "The insertion of § 107(c) with its different treatments of the two chapters [154 and 153] thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) ("Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'"); *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308, 1314 (11th Cir. 2001) (Congress' use of word "reasonable" with respect to one set of items but not another indicates that Congress acted purposefully in deciding whether to include or exclude reasonableness standard); *Trenkler v. United States*, 268 F.3d 16, 23 (1st Cir. 2001) ("the omission in § 2255 [of AEDPA] of the tolling language that is present in § 2244(d)(2) gives rise to a negative inference that the statute of limitations for § 2255 is not tolled while federal prisoners pursue other forms of post-conviction relief"); *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 129-30 (2d Cir. 1998) ("Congress' use of explicitly retroactive language in that part of the bill [AEDPA § 413(g)], and its failure to employ any analogous language in the nearby and closely related § 440(d), by itself strongly indicates that Congress did not intend § 440(d) to apply retroactively."). Thus, the statutory construction of AEDPA supports application of Fed. R. Civ. P. 8(c) and its principles to AEDPA's statute of limitations.

C. Rule 4 Of The Habeas Rules Does Not Authorize A Court To Dismiss A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

The court of appeals erred in concluding that Rule 4 of the Habeas Rules ("Rule 4") authorizes a court to dismiss a petition *sua sponte* even after an answer has been filed. *Day v. Crosby*, 391 F.3d 1192, 1194-95 (11th Cir. 2004). Rule 4 provides in relevant part:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition . . . . *If the petition is not dismissed,* the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.[10]

Rule 4 (emphasis added). The most logical reading of Rule 4 is that a court may dismiss *sua sponte* a facially deficient habeas petition brought under § 2254 *prior* to a responsive pleading being filed, but not after. The language of Rule 4 is sequential and expressly allows a court to dismiss *sua sponte* a habeas petition prior to ordering a responsive pleading.

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[10] *Amici* cite to the current version of the Rule, which was amended effective December 1, 2004. Notably, Congress could have amended Rule 4 in order to clarify any intent to give district courts a continuing power to dismiss *sua sponte* even after a responsive pleading is filed. *See Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. . . . This [approach] allows both of our branches to adhere to our respected, and respective, constitutional roles.").

In holding that a court may summarily dismiss a petition *sua sponte* even after requesting a responsive pleading, the Eleventh Circuit relied on inapposite cases that affirm a district court's power to dismiss a petition *prior* to answer.[11] There is nothing in Rule 4 that authorizes a court to dismiss *sua sponte* after the court has ordered the responsive pleading. To read absent words into the Rule "would result 'not [in] a construction'" of the Rule, "'but, in effect, an enlargement of it by the court.'" *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (citation omitted). Thus, under the rules of statutory construction discussed above, Rule 4 should be interpreted as allowing only that which it expressly authorizes. *See United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) (legislative intent is found in the legislature's chosen language; "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute"); *see also Lamie*, 540 U.S. at 534 (when a statute's language is plain, it is the court's duty to "'enforce it according to its terms'" (citations omitted)); *Lewis v. Barnhart*, 285 F.3d 1329, 1331-32 (11th Cir. 2002) ("'"[W]here the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent

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[11] *See Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002) ("Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, as the district court did here, it acts consistently with Rule 4."); *Herbst v. Cook*, 260 F.3d 1039, 1042 n.3 (9th Cir. 2001) ("The issue of waiver is irrelevant under the facts here, where the district court dismissed a petition *sua sponte* before the state ever filed a response."); *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (Rule 4 "give[s] the district court the power to review and dismiss habeas petitions prior to any responsive pleading by the state."); *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("The district court has the power under Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state.").

because we must presume that Congress said what it meant and meant what it said.'"'" (citations omitted)).[12]

The Advisory Committee Notes to Rule 4 support this interpretation, explaining that a district court is granted the initial power to dismiss *sua sponte* a facially deficient petition to "screen out frivolous petitions and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." *See* Rule 4 advisory committee's note (citing *Allen v. Perini*, 424 F.2d 134, 141 (1970)). Thus, the court fulfills the purpose of Rule 4 by dismissing any frivolous or facially invalid petition prior to ordering a responsive pleading. Allowing *sua sponte* dismissal after an answer has been filed would undermine the very purpose of Rule 4 by unnecessarily burdening a respondent with the filing of an answer.

The Courts of Appeals in both the Sixth and the Ninth Circuits have held that Rule 4 merely grants the courts an ability to dismiss a petition *sua sponte* as an initial matter. In *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002), a federal magistrate judge instructed respondent Collins to file a response addressing, among other issues, whether petitioner Scott's claims were barred by the one-year AEDPA statute of limitations. Collins filed a timely response that omitted any discussion of the statute of limitations defense. The magistrate judge then ordered

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[12] Nor is the language in Rule 4 allowing the court to "take other action the judge may order" intended to grant district courts the power to dismiss *sua sponte* after an answer is filed. Rather, this provision is "designed to afford the judge flexibility in a case where *either dismissal or an order to answer may be inappropriate.*" Rule 4 advisory committee's note (emphasis added). The Advisory Committee Notes make clear that "other action[s]" are those that "may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition," or those actions that might clarify or narrow a petition *prior* to an answer being filed. *Id.*

Scott to show cause why the court should not dismiss his petition as time-barred. The district court found Scott's response to the show cause order inadequate, and dismissed his petition with prejudice based on its untimeliness. Scott appealed to the Sixth Circuit after the district court granted a certificate of appealability on the issue of whether the statute of limitations barred his habeas petition. *Id.* at 925-26.

In deciding whether Scott's petition was barred, the Sixth Circuit engaged in a two-part analysis. First, the court determined that Collins had waived the statute of limitations defense by failing to plead it in his answer. The court reasoned that the one-year AEDPA statute of limitations defense is no different from any other affirmative defense, and a party must therefore raise the defense in its first responsive pleading in order to avoid waiver. *Id.* at 927-28.

Second, the Sixth Circuit examined whether a district court may *sua sponte* cure a waiver of the statute of limitations defense. The court held that Rule 4 permits a district court to dismiss *sua sponte* as an "initial matter . . . if it plainly appears from the face of the petition that the petitioner is not entitled to relief." *Id.* at 929-30. The court further held, however, that "Rule 4's use of the word 'otherwise' indicates that, if, after prompt examination, a judge does not summarily dismiss the case, the judge must order respondent to either file an answer or take other appropriate action." *Id.* at 930. Thus, the court's power to summarily dismiss a petition *sua sponte* "expires" upon requesting an answer, so that *sua sponte* dismissal after this point would constitute an "impermissible curing of the respondent's waiver." *Id.*

In *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004), the Ninth Circuit adopted the reasoning of the *Collins* court in concluding that a court's power to dismiss *sua sponte* expires after it requests an answer or other

responsive pleading. After reviewing petitioner Nardi's habeas petition, the district court required the State to file an answer. The district court specifically invited the State to address the timeliness of Nardi's petition. The State's answer merely addressed the merits of Nardi's claims and failed to challenge the timeliness of his petition even though the petition was filed well after the statute of limitations had expired. The district court, adopting the magistrate's recommendation, dismissed Nardi's petition based on its untimeliness, reasoning that the State was "'not deemed to have waived the limitations period unless expressly waived.'" *Id.* at 1136.

The Ninth Circuit reversed, holding that the State's failure to raise the statute of limitations in its answer was an effective waiver of the defense that precluded the district court from dismissing the petition as untimely. As in *Collins*, the Ninth Circuit recognized the AEDPA statute of limitations as an affirmative defense that must be pleaded in order to avoid waiver. The court noted that prior to the State's filing a response, a district court "'has the authority to exercise its discretion by raising the statute of limitations *sua sponte* when doing so furthers the interests of comity, federalism, and judicial efficiency.'" *Id.* at 1141 (quoting *Herbst v. Cook*, 260 F.3d 1039, 1042 n.3 (9th Cir. 2001)). The court held, however, that the language of Rule 4 "does *not* authorize a court to dismiss the petition *sua sponte* after ordering respondent to file an answer." *Id.* A post-answer dismissal on the basis of a waived statute of limitations defense would therefore constitute an "'impermissible curing of the respondent's waiver.'" *Id.* at 1142 (quoting *Collins*, 286 F.3d at 930).

The *Collins* and *Nardi* opinions adopt a logical and straightforward reading of Rule 4 that is consistent with Federal Rules of Civil Procedure principles and the statutory construction of AEDPA. The text and Advisory Committee Notes of Rule 4 make clear that a court's

power to dismiss *sua sponte* expires upon requesting the filing of a responsive pleading. An alternative reading that permits a court to subsequently dismiss *sua sponte* reads absent words into the Rule and constitutes unwarranted enlargement of the court's power. *Lamie*, 540 U.S. at 538.

D. Historical Principles And Policy Considerations Disfavor Dismissal Of A Habeas Petition *Sua Sponte* After A Responsive Pleading Has Been Filed

Historical principles and policy considerations counsel against dismissal of a habeas petition *sua sponte* after a responsive pleading has been filed with the court. These considerations include: (1) common law rules treating the statute of limitations as a waivable affirmative defense; (2) the essential nature of the adversarial system; (3) the parties' interests in finality and certainty; and (4) the historical significance of the writ of habeas corpus.

At common law, there was no statute of limitations applicable to habeas claims, a principle that was recognized by this Court. *United States v. Smith*, 331 U.S. 469, 475 (1947) ("*[H]abeas corpus* provides a remedy . . . without limit of time."); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions.").[13] In 1996, however, for the first time, AEDPA established a one-year statute of limitations for habeas petitions. *See Brown v. Angelone*, 150 F.3d 370, 371 (4th Cir. 1998). In the Congressional debate over

[13] Although Rule 9(a) of the Habeas Rules had permitted a district court to dismiss a petition under certain circumstances if the State proved prejudice by delay in filing the petition, this Court found that a prisoner's six-year delay in filing a habeas petition did not violate Rule 9(a). *See Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996).

AEDPA's statute of limitations provision, Representative Pelosi noted the drastic impact of this significant departure from the common law: "For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time-bound, they are timeless or they are worthless." 142 Cong. Rec. H3614 (daily ed. Apr. 18, 1996). Moreover, unlike other provisions of AEDPA, such as the successive-petition and evidentiary hearing provisions,[14] which were enacted after development of a consistent body of common law on the topic, the statute of limitations on habeas corpus petitions was a pure legislative creation – orphaned from any common law supporting a time limitation for habeas.

But that was as far as Congress went. As discussed in section II.B *supra*, there is no language in AEDPA indicating that Congress also sought to depart from the common law rules treating the statute of limitations as a waivable affirmative defense. As such, AEDPA's statute of limitations must be interpreted narrowly. *See* Norman J. Singer, *Statutes and Statutory Construction* § 50.01, at 140 (6th ed. rev. 2000) ("Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." (footnote omitted)).

As this Court has recognized since 1879: "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879). The Court has emphasized that "[i]t is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v.*

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[14] 28 U.S.C. § 2244(b)(3)(A) and § 2254(e)(2), respectively.

Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35-36 (1983) (citations omitted).[15] Thus, an expansive interpretation of the AEDPA statute of limitations as an unwaivable defense simply is not warranted.

Respect for the proper functioning of our adversarial system is another consideration that weighs heavily against permitting a court to *sua sponte* dismiss a petition after the court requests filing of a responsive pleading. As discussed in section I *supra*, the defining feature of our adversarial system is that parties to a dispute, rather than the courts, are responsible for framing the issues to be litigated. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions *presented and argued by the parties* before them." (emphasis added)); *Lewis v. New York*, 547 F.2d 4, 5 (2d Cir. 1976) ("It is prudent for judges to avoid the inquisitorial role, and *not search out issues* more appropriately left to a motion by the opposing party." (emphasis added)). A court acts in a manner consistent with the essential nature of an adversarial system when it limits its review to affirmative defenses raised by a party in its responsive pleading. However, a court that attempts to cure a State's omission of the statute of limitations defense from its responsive pleading "come[s] dangerously close to acting as [an] advocate[] for the state" rather than as an "impartial" judge of an adversarial proceeding. *See Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997).

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[15] *See, e.g., Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261 (1st Cir. 2004) ("[T]o find broad preemption in the UFTA, in the absence of language of preemption, would be at odds with the presumption that statutes should not be construed to alter common law principles absent an explicit statement of legislative intent to do so.").

The parties' interests in finality and certainty also disfavor recognizing a court's power to dismiss a petition *sua sponte* after ordering the filing of a responsive pleading. Interpreting Rule 4 in the manner set forth in section II.C *supra* promotes clarity and certainty for both a habeas petitioner and the State. A court has the initial power to dismiss a deficient petition. Should the court choose not to dismiss and instead request a responsive pleading, the pleading will put the petitioner on certain notice of what, if any, affirmative defenses the petitioner must address and contend with. The State is also on notice that it must carefully present any and all of its affirmative defense arguments in its responsive pleading. Granting a court the power to dismiss a petition on statute of limitations grounds at any time would unsettle the expectations of both parties and strip the process of necessary predictability. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

Finally, the importance of the writ of habeas corpus also counsels in favor of interpreting the statute of limitations narrowly. The right of habeas corpus, as a facet of American law, is as old as our Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The right to petition for a writ of habeas corpus has been a federal statutory right for nearly as long. *See* Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81 (1845); 28 U.S.C. § 2254(a). Because of the significance of the writ, this Court has recognized the importance of allowing a defendant the opportunity for one round of federal review: "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (the writ "has been for centuries esteemed the best and only

sufficient defence of personal freedom")). Thus, rules that operate to limit a petitioner's right to initial habeas review should be examined with heightened scrutiny.

CONCLUSION

For all of the reasons set forth above, *Amici* respectfully request that this Court reverse the ruling of the Eleventh Circuit and grant Mr. Day's petition for a writ of habeas corpus.

Respectfully submitted,

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